

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
MOLOKAI PUBLIC UTILITIES, INC. )  
For Review and Approval of Rate )  
Increases, Revised Rate Schedules, )  
and Revised Rules. )  
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DOCKET NO. 2009-0048

ORDER DENYING WEST MOLOKAI ASSOCIATION'S  
MOTION FOR ISSUANCE OF SUBPOENAS

FILED

2010 MAY 10 P 3:00

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MOTION FOR ISSUANCE OF SUBPOENAS

By this Order, the commission denies WEST MOLOKAI ASSOCIATION's ("WMA") Motion for Issuance of Subpoenas, filed on April 29, 2010.<sup>1</sup>

I.

Background

On April 29, 2010, WMA filed its Motion for Issuance of Subpoenas, requesting the commission to issue subpoenas to Messrs. Daniel Orodenker and Harold Edwards to require their appearances before the commission to testify at the evidentiary hearing, scheduled to commence on May 11, 2010. On May 4, 2010: (1) the County joined in WMA's motion; (2) MPU filed its Memorandum in Opposition to WMA's motion, together with its

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<sup>1</sup>The "Parties" in this proceeding are MOLOKAI PUBLIC UTILITIES, INC. ("MPU" or "MPUI"), MOLOKAI PROPERTIES LIMITED ("MPL"), the COUNTY OF MAUI ("County"), WMA, and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY, an ex officio party, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

objection to the County's joinder; and (3) MPL joined in MPU's Memorandum in Opposition to WMA's motion, and in MPU's objection to the County's joinder. On May 5, 2010, the County filed a response to MPU's objection to the County's joinder and MPL's joinder in MPU's objection.

## II.

### Discussion

HRS § 269-10 states in part that in all commission proceedings "each commissioner shall have the same powers respecting administering oaths, compelling the attendance of witnesses and the production of documentary evidence, examining witnesses, and punishing for contempt, as are possessed by the circuit courts."

HAR § 6-61-38, governing requests for subpoenas, provides:

Requests for subpoenas. (a) Any party may request the issuance of a subpoena requiring the attendance of a witness to testify before the commission. The request shall be in writing and shall state the reasons why the testimony of the witness is material and relevant to the issues in this proceeding.

(b) Any party may request the issuance of a subpoena duces tecum for the production of documents or records. The records must:

- (1) Be in writing;
- (2) Specify the particular document or record, or portion of document or record sought; and
- (3) State the reasons why the production is material and relevant to the issues in this proceeding.

(c) Only parties may request the issuance of a subpoena.

(d) The presiding officer may issue a subpoena. In the absence of the presiding officer, any commissioner may issue a subpoena. No subpoena shall be issued unless the party requesting the subpoena has complied with subsections (a) or (b) and gives the name and address of the desired witness. Signed and sealed blank subpoenas shall not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, and a copy shall be filed in the proceeding. A subpoena shall show at whose request or order the subpoena is issued.

(e) The party requesting a subpoena shall pay to the witness the same fees and mileage as are paid witnesses in circuit courts of the State.

(f) Witnesses shall be placed under oath prior to testifying.

HAR § 6-61-38; see also HRS § 91-10(1) (every administrative agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious oral or documentary evidence in contested cases).

In its motion, WMA contends that: (1) MPU's witness for its case-in-chief, Mr. Robert O'Brien, is a non-policy witness, and thus, the record will have no testimony of policy persons representing MPU; (2) policy issues abound; and (3) Mr. Orodanker is the only person who can speak authoritatively on recent MPU policies leading up to the filing of the water utility's application. WMA further asserts that "another example of the need for [Mr.] Orodanker's testimony is confusion caused by his Responses to Information Requests, which imply that the company does not own the 170-plus fire hydrants in the service areas, and that MPUI has no obligation to maintain these components of a

water system critical to the safety and public welfare within the service area."<sup>2</sup>

In its opposition, MPU counters that: (1) Mr. Peter Nicholas, who will be present and available to testify at the evidentiary hearing, is the executive director of MPL and an officer and director of MPU; (2) "Mr. Nicholas is more qualified than Mr. Orodener to discuss policy issues regarding [the] allocation of MPUI and MPL resources and policies leading to the filing of the application[;]"<sup>3</sup> and (3) while Mr. Orodener sponsored responses on behalf of MPL regarding fire hydrants, Mr. Nicholas is equally familiar with the subject-matter and will be available for questioning at the evidentiary hearing.

With respect to Mr. Edwards, WMA claims that: (1) Mr. Edwards is one of the few individuals knowledgeable about all of the considerations made with regards to the construction of the Puunana Water Treatment Facility; and (2) because the facility was "hurriedly constructed", constitutes virtually all of MPU's rate base, and utilizes a high volume of expensive water, "the information to be provided by Mr. Harold Edwards is deemed helpful and necessary for the development of a complete evidentiary record in this proceeding."<sup>4</sup>

MPU responds that: (1) WMA has failed to indicate, and MPU has been unable to discern, the information requests relating

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<sup>2</sup>Memorandum in Support of WMA's Motion for Issuance of Subpoenas, at 2-3.

<sup>3</sup>MPU's Memorandum in Opposition to WMA's Motion for Issuance of Subpoenas, at 2.

<sup>4</sup>Memorandum in Support of WMA's Motion for Issuance of Subpoenas, at 3.

to all the considerations made with regards to the construction of the Puunana Water Treatment Facility; (2) Mr. Nicholas was an officer and director of MPU at the time the new treatment plant was installed, while Mr. Edwards has not been with MPU for three years; and (3) Mr. Nicholas will be able to respond to WMA's questions; thus, there is no need to subpoena Mr. Edwards.

Based on the record, the commission declines to issue a subpoena to compel Mr. Orodener's or Mr. Edwards' appearance at the evidentiary hearing. In its motion, WMA fails to satisfactorily demonstrate why the testimony it believes Mr. Orodener and Mr. Edwards will provide could not have been obtained during the discovery phase of this docket, through information requests or, if necessary, through a pre-hearing motion to compel responses.<sup>5</sup> The commission's procedures, which require the filing of written direct testimonies by the parties, are not intended to allow parties to conduct "discovery" during the hearing. WMA's status as an intervenor or its financial constraints, if any, do not allow it to circumvent the commission's procedures.<sup>6</sup>

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<sup>5</sup>At the pre-hearing conference, WMA indicated that Mr. O'Brien had sponsored MPU's responses to certain information requests; that Mr. O'Brien lacked the personal knowledge to respond to those questions; and that WMA believed that Mr. Orodener and Mr. Edwards were the appropriate employees to respond. In its motion, however, MPU does not allege that Mr. Orodener or Mr. Edwards should be required to testify for that reason.

<sup>6</sup>The commission further notes that MPU represents that Mr. Nicholas is knowledgeable about the matters that WMA sought testimony by Mr. Orodener and Mr. Edwards and that Mr. Nicholas will be available for cross-examination during the hearing.

Notwithstanding the denial of WMA's motion the commission notes that, in its Memorandum in Opposition to West Molokai Association's Motion for Issuance of Subpoena, filed May 4, 2010, MPU states that Mr. Orodener had sponsored responses to information requests "on behalf of MPL regarding fire hydrants[.]" Generally, witnesses who sponsor responses on behalf of a party to information requests must be available for cross-examination concerning the sponsored responses. It would be patently unfair to allow a party to testify, via responses to information requests, without the benefit of cross-examination by the other parties. See HAR § 6-61-33 ("Each party has the right to conduct such cross-examination of the adverse party's witnesses as may be required for a full and true disclosure of the facts and has the right to submit rebuttal evidence."). In this case, however, none of the parties, before, during or after the pre-hearing conference, requested that Mr. Orodener be available at the hearing for cross-examining regarding his responses. Accordingly, the commission declines to grant WMA's motion. However, should any of the non-MPU parties request to cross-examine Mr. Orodener on the matters involving his sponsored responses to information requests, MPU shall make Mr. Orodener available for cross examination at the evidentiary hearing limited to the matters involving his sponsored responses to information requests.

III.

Orders

THE COMMISSION ORDERS:

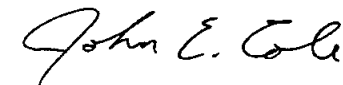
1. WMA's Motion for Issuance of Subpoenas, filed on April 29, 2010, is denied.

2. Should any of the non-MPU parties request to cross-examine Mr. Orodanker on the matters involving his sponsored responses to information requests, MPU shall make Mr. Orodanker available for cross examination at the evidentiary hearing limited to the matters involving his sponsored responses to information requests.


DONE at Honolulu, Hawaii MAY 10 2010.

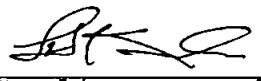
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By:   
John E. Cole, Commissioner

APPROVED AS TO FORM:

  
Michael Azama  
Commission Counsel

By:   
Leslie H. Kondo, Commissioner

2009-0048.cp



CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

DEAN NISHINA  
EXECUTIVE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
P. O. Box 541  
Honolulu, HI 96809

MICHAEL H. LAU, ESQ.  
YVONNE Y. IZU, ESQ.  
SANDRA L. WILHIDE, ESQ.  
MORIHARA LAU & FONG LLP  
841 Bishop Street, Suite 400  
Honolulu, HI 96813

Counsel for MOLOKAI PUBLIC UTILITIES, INC.

MARGERY S. BRONSTER, ESQ.  
JEANNETTE H. CASTAGNETTI, ESQ.  
BRONSTER HOSHIBTA  
1003 Bishop Street  
2300 Pauahi Tower  
Honolulu, HI 96813

Counsel for the COUNTY OF MAUI

WILLIAM W. MILKS, ESQ.  
LAW OFFICE OF WILLIAM W. MILKS  
ASB Tower, Suite 977  
1001 Bishop Street  
Honolulu, HI 96813

Counsel for WEST MOLOKAI ASSOCIATION

JAMES J. BICKERTON, ESQ.  
BICKERTON LEE DANG & SULLIVAN  
Topa Financial Center  
Fort Street Tower  
745 Fort Street, Suite 801  
Honolulu, HI 96813

Counsel for MOLOKAI PROPERTIES LIMITED